IN THE SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA ex rel. M. LANDO VOYLES PINAL COUNTY ATTORNEY Plaintiff/Petitioner, vs. THE HONORABLE PETER J. CAHILL, VISTING JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PINAL, Respondent And RICHARD T. WILSON, Real Party in Interest.	)	Arizona Supreme Court No. CV 14-0265-PR Court of Appeals, Division Two 2 CA-SA 2014-0050 Pinal County Superior Court No. CR 201201764

AMICUS CURIAE BRIEF OF THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL IN SUPPORT OF PETITIONER, STATE OF ARIZONA

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*.

The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") respectfully submits this *amicus curiae* brief on behalf of its members, in support of Petitioner, the Pinal County Attorney's Office.

APAAC is a state agency created by A.R.S. § 41-1830 *et seq.* APAAC is comprised of, *inter alia,* the elected county attorneys from Arizona's fifteen counties, in addition to the Arizona Attorney General, and several head city court prosecutors. APAAC's primary mission is to provide training, resources, and a variety of other services to the more than 800 state, county, and municipal prosecutors in Arizona. APAAC also serves as the liaison for prosecutors with the legislature and the courts, advocating for prosecutorial interests before the legislature or proposing changes to this Court's procedural rules.

In its capacity as a state agency, Rule 16(a), Ariz. R. Civ. App. P. specifically permits APAAC to file an *amicus curiae* brief without requiring either consent of the parties or leave of court. Based on its status as a state agency, this Court has accepted *amicus curiae* briefs from APAAC in other cases.

In its role as a prosecutorial educator, advocate, and resource, APAAC has a significant interest in the issue involved in this case. In the absence of truly controlling precedent, and misapplying the law that does exist, Respondent Judge disqualified the entire Pinal County Attorney's Office from prosecuting a death

penalty case set to be tried in November 2014 - not for a prosecutor's conflict of interest or personal interest in the case—but for opening two online documents that were marked "sealed." No prejudice was found to the Real Party in Interest ("Defendant") and the documents did not contain confidential information.

Respondent Judge's Order is not supported by the facts or law, and granted relief that in essence would prohibit the Pinal County Attorney's Office from prosecuting *any* death penalty case. The disastrous fallout of this decision is obvious; not only to Pinal County but to other prosecutorial agencies that would somehow be expected to absorb these cases. It would also result in further delay and taxpayer cost for these cases to be transferred from the County directed by law to prosecute them to another County when it is simply not required by either the law or facts of this case.

Before the right of the people to be represented by their duly elected County Attorney is infringed upon, the judicial branch should scrupulously ensure that the removal of an entire prosecuting agency complies with the law. Respondent Judge failed to do so in this case, leaving the people of Pinal County without an equally plain, speedy, and adequate remedy by appeal. This is an issue of first impression. Yet, due to Respondent Judge's unsupported finding that the Pinal County Attorney's Office cannot be trusted to prosecute any death penalty case, he has

surely opened the floodgates for such challenges to recur. This is a matter of statewide importance and public concern.

For all these, reasons, APAAC joins with Petitioner, Pinal County, in asking this Court to accept review and grant relief.

II. ARGUMENT

A. Respondent Judge Acted Without and/or in Excess of his Authority, Made an Arbitrary and Capricious Determination, and Abused his Discretion in Applying the *Alexander* Factors to Disqualify the Pinal County Attorney's Office from Prosecuting this Death Penalty Case.

In the July 8, 2014 Order Granting Motion, Respondent Judge states that *Alexander v. Superior Court*, 141 Ariz. 157, 685 P.2d 1309 (1984), sets forth a four-part test for determining whether a **prosecuting office** should be disqualified.

The Respondent Judge erred in applying *Alexander* for several reasons. First, the *Alexander* Court relied upon Canons from the American Bar Association's Model Code of Professional Responsibility in considering whether the trial court erroneously disqualified a party's attorneys. However, subsequent to the *Alexander* opinion, this Court adopted its own ethical rules for Arizona. Therefore, the relevant ethical rules lie not in the Model Code, but rather in Arizona Rules of the Supreme Court, Rule 42.

Further, the analysis set forth in *Alexander* is not applicable to the case at bar because *Alexander* was limited to a discussion of the factors to be considered for

the disqualification of a single privately-retained defense attorney, not an entire county attorney's office. The removal of an entire county attorney's raises important constitutional issues that were never considered in *Alexander*.

No Arizona appellate cases deal with the issue of the removal of an entire prosecutor's office in circumstances such as occurred here. The few Arizona cases that have dealt with the removal of an entire prosecuting office are based upon a conflict of interest; that is, a prosecuting office's employment of a prior defense counsel that under very rare circumstances has led to vicarious disqualification. Indeed, there are no cases unrelated to a conflict of interest that even discuss the concept of "appearance of impropriety."

The distinction is critical, as the removal of an entire prosecutorial agency (as opposed to one or more prosecutors within that office) prevents the duly elected County Attorney from exercising his constitutional powers. The Arizona Constitution sets forth a three-branch system of government, under which criminal cases are prosecuted by the duly elected County Attorney of the county in which the crime occurred. Ariz. Const. art. III; Ariz. Const. art. XII, §§ 3 and 4; *State ex rel. Berger v. Myers*, 108 Ariz. 248, 495 P.2d 844 (1972).

In *Berger*, the Maricopa County Attorney's Office sought special action relief from a trial court order restraining a grand jury investigation that was at least

partially dependent upon allegedly illegally obtained wiretap evidence. *Berger*, quoting from an earlier opinion by this Court, held that,

> We think the law is fixed beyond cavil that courts of equity have no power by injunction to restrain a public officer from performing an official act that he is required by valid law to perform. **It is not sufficient to clothe the court with jurisdiction to say simply that, unless the court extends its restraining hand, hardships will follow, or irreparable damage will ensue, because the officer delegated to execute such law may act unwisely or injuriously to the party seeking relief.**

State ex rel. Berger v. Myers, 108 Ariz. 248, 249, 495 P.2d 844, 845 (1972) (emphasis added).

Berger went on to hold that, "The superior courts of this state may not restrain a public official such as the county attorney or a public body such as the grand jury from discharging the duties imposed upon them by law.... Only where public officers are acting illegally or in excess of their powers may they be enjoined." *Id.* at 250; 495 P.2d at 846.

A violation of the separation of powers doctrine occurs when one branch of government usurps another branch's powers or prevents that other branch from exercising its authority. *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 121, 290 P.3d 1226, 1244 (App. 2012); *see also State ex rel. Woods v. Block*, 189 Ariz. 269, 276, 942 P.2d 428, 435 (1997).

Although *Berger* dealt with a situation involving an improperly issued injunction that limited a county attorney's performance of his duties, *Berger's*

holding applies equally to Respondent Judge's Order in this case, which removed not only a particular attorney, but the entire Pinal County Attorney's Office because Respondent Judge found the County Attorney's Office was likely to not follow the rules in the future. *Berger* stands for the proposition that the trial court should not impede the county attorney's performance of his duties based on the supposition that **the officer delegated to execute such law may act unwisely or injuriously to the party seeking relief.**

In the absence of any controlling authority, this Court should grant review and provide guidance as to what circumstances should be considered when an entire county attorney's office is sought to be disqualified following the State's viewing of sealed *ex parte* information. For the reasons that follow, APAAC posits that disqualification should only be considered as a remedy when a Sixth Amendment violation has resulted from the State's conduct.

Any such determination should include a finding whether there was even an intrusion by the State into the defendant's attorney-client relationship, and if so, whether that intrusion resulted in a Sixth Amendment violation. In making that determination, the trial court must consider: (1) the motive behind the intrusion; (2) the use made of any materials obtained through the intrusion; (3) whether interference with the attorney-client relationship was deliberate; (4) whether the State benefitted in any way from the intrusion; (5) if materials were used, how any

taint was purged from the defendant's trial; and (6) whether the defendant was, in fact, prejudiced. *State* v. *Pecard,* 196 Ariz. 371 at ¶ 29, 998 P.2d 453 (App. 1999), *citing State* v. *Warner,* 150 Ariz. 123, 129, 722 P.2d 291 (1986).

Here, there was never a finding of a Sixth Amendment violation. The draconian sanction of disqualification of the entire Pinal County Attorney's Office was because of a violation of an order marking the documents "sealed." The documents themselves were ultimately found to not even be confidential. (Reporter's Transcript, 5/6/14 at 25-26, 78-80.)

Sixth Amendment violations do not simply turn on the State's successful acquisition of information but more fundamentally on the interference with access to counsel. *Pecard, supra at* ¶ 32. In *Pecard,* the State improperly recorded or monitored telephone calls between the defendant and his attorney or led the parties to believe they were being recorded or monitored, and the State improperly opened privileged mail. In *Warner, supra,* the State improperly seized legal materials from the defendant.

Focusing on whether a Sixth Amendment violation occurred is consistent with this Court's holding in *Alexander,* that the removal of counsel to avoid an appearance of impropriety is only appropriate when a party has actually suffered prejudice.

Alexander provided the following guidance on the question of removing counsel solely for the appearance of impropriety when there has been no prejudice to a party,

> We are, then, only concerned with the "appearance of impropriety," and the question we have before us is whether an appearance of impropriety alone will give a party standing to interfere with an adverse party's choice of counsel. We agree with the line of cases that have applied a stricter scrutiny when reviewing possible Canon 9 violations as a basis for disqualification. *See Board of Education of New York City v. Nyquist,* 590 F.2d 1241, 1247 (2d Cir.1979) ("when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest of cases"); *Woods v. Covington County Bank,* 537 F.2d 804, 819 (5th Cir. 1976) ("Inasmuch as attempts to disqualify opposing counsel are becoming increasingly frequent, we cannot permit Canon 9 to be manipulated for strategic advantage on the account of an impropriety which exists only in the minds of imaginative lawyers"); *International Electronics Corp. v. Flanzer,* 527 F.2d 1288, 1295 (2d Cir.1975) ("Canon 9 * * * should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules"). *See also* ABA Formal Opinion 342 (24 Nov. 1975). It is obvious from a reading of these cases that the use of Canon 9 "as a convenient tool for disqualification" should not be encouraged. "To call for the disqualification of opposing counsel for delay or other tactical reasons, in the absence of prejudice to either side, is a practice which will not be tolerated." *Cottonwood Estates v. Paradise Builders,* 128 Ariz. 99, 105, 624 P.2d 296, 302 (1981).

Alexander v. Superior Court, 141 Ariz. 157, 165, 685 P.2d 1309, 1317 (1984).

B. Even if the *Alexander* Test is Appropriate, Respondent Judge Abused his Discretion and Erred as a Matter of Law in Applying That Test.

Even if *Alexander* does apply to this case, Respondent Judge erred as a matter of law in applying *Alexander*. Included in those errors were making findings not supported by the record while simultaneously ignoring and/or misinterpreting certain of the *Alexander* factors.

Alexander held that a court, in deciding a motion for disqualification based upon the appearance of impropriety should consider: (1) whether the motion has been brought for purposes of harassment; (2) whether the party bringing the motion will be damaged in some way if the motion is not granted; (3) whether there are alternative solutions, or if the proposed solution is the least damaging possible under the circumstances; and (4) whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation. *Alexander*, 141 Ariz. at 165, 685 P.2d at 1317.

The second factor required Respondent Judge here to assess prejudice to Defendant; that is, whether the "party bringing the motion" would be damaged if the motion was not granted. Respondent Judge made no such finding. Instead, he found there was a potential for *future* prejudice to Defendant if the Pinal County Attorney's Office continues to disregard court orders intended to keep some matters *ex parte*. (Ruling at 8.) Respondent Judge's finding of the potential for

prejudice in the future is error and fundamentally misapplies *Alexander's* test, which looks to actual prejudice to the moving party. *Alexander*, 141 Ariz. at 165, 685 P.2d at 1317.

The only prejudice Respondent Judge identified was "prejudice to the authority of the court;" a concept that appears in no disqualification case in Arizona, and certainly not in *Alexander*. And, Respondent Judge supported this finding of prejudice with his own speculation that the Pinal County Attorney's Office would continue to violate court orders in the future and essentially cannot be trusted to prosecute any death penalty cases:

> But prejudice has been shown. That prejudice is to the authority of the court. There is no reason to believe that this County Attorney and his employees will respect its orders in the event a judge makes a "bad call," in a deputy County Attorney's opinion. With particular reference to ex parte proceedings filed under Rule 15.9, ARCrP, the court concludes that this County Attorney and his staff will, as they have shown, put themselves above the law, that they believe they decide what may be properly filed under seal. The message to the court has been received: when a member of the Pinal County Attorney's staff decides that a judge has made a "bad call," they will act just as they did here, they will ignore the court's order because, in their opinion, it is a "wrong ruling."

(Ruling at 8-9.)

Ironically, during the hearing itself, Respondent Judge found just the opposite: "But, you know it's not much of a pattern. It's looking at two sealed records and printing them, but I don't think you are going to get too far on showing some sort of a pattern that entitles you to relief just within the 3:00 o'clock hour on

July 18th." (Reporter's Transcript, 5/8/14 at 53.) "I think the assumption that Ms. Eazer has and that the Court would certainly have is it's unlikely for that to happen again in this case." (*Id*. at 64.)

The record before Respondent Judge was uncontested that the clerk's office had changed their computer system's configuration so that the County Attorney's Office no longer had access to sealed documents, and page 3 of the court's order in fact found that further access to sealed documents by the Petitioner's personnel had been terminated. Without the ability to access sealed *ex parte* documents, there is no substantial likelihood the documents would be accessed in the future, even if the County Attorney possessed a proclivity to do so.

Respondent Judge also misapplied *Alexander* factors (3) and (4). Factor 3 requires the court to consider whether the proposed solution is the least damaging alternative. *Alexander*, 141 Ariz. at 165, 685 P.2d at 1317. Here, while Respondent Judge stated that he had considered financial penalties and contempt, he found disqualification the appropriate remedy "given the gravity of the violation." (Ruling at 2, 9.) This completely ignores any assessment of the disruption, delay, and expense that would result from an eleventh hour disqualification of the prosecuting agency in a death penalty case.

Finally, Respondent Judge erred in the application of *Alexander* factor 4. Factor 4 requires the court to consider whether the possibility of public suspicion

outweighs any benefits that might accrue from continued representation. *Alexander*, 141 Ariz. at 165, 685 P.2d at 1317. Respondent Judge found that the appearance of impropriety *and* the possibility of public suspicion significantly outweighed any benefits of continued representation by the Pinal County Attorney's Office. (Ruling at 9.) However, the "appearance of impropriety" is the four-factor test itself. Respondent Judge's inexplicable joining of that with factor 4 was erroneous. Moreover, Respondent Judge does not discuss any of the benefits of continued representation, simply ignoring the inevitable delay and expense that will be engendered by handing over a death penalty trial to another county to prosecute.

In terms of "public suspicion," Arizona disqualification cases have discussed how public confidence in the criminal justice system may be eroded when a prosecutor has a conflict of interest or a personal interest in a case. *Villalpando v. Reagan*, 211 Ariz. 305, 308, ¶ 11, 121 P.3d 172, 175 (App. 2005); *Turbin v. Superior Court of Navajo County*, 165 Ariz. 195, 198-99, 797 P.2d 734, 737-38 (App. 1990). Those circumstances are not present here. Respondent Judge found that violation of a court order sealing documents diminished public confidence in the criminal justice system such that it justified disqualification of the entire Pinal County Attorney's Office from prosecuting a death penalty case set to be tried in two months.

That finding was an abuse of discretion. No reasonable member of the public would find an appearance of impropriety in the Pinal County Attorney's Office continuing to prosecute this case under these circumstances. *See State ex rel. Romley v. Superior Court (Pearson)*, 184 Ariz. 223, 230, 908 P.2d 37, 44 (App. 1995). Indeed, the public might be more disturbed by the disqualification of a prosecuting agency in a death penalty case when it is simply not justified under the facts or the law.

Clearly Respondent Judge was frustrated with the circumstances that led to the motion for sanctions, and sought to impose a sanction. However, his reliance upon disqualification due to an appearance of impropriety as the method to punish the Pinal County Attorney was improper. As this Court warned, "Canon 9 should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules." *Alexander*, 141 Ariz. at 165, 685 P.2d at 1317 (internal citations omitted).

IV. CONCLUSION

APAAC respectfully urges this Court to accept review of the State's Petition for Review and grant relief. Removal of an entire county attorney's office in the absence of a finding of actual prejudice to a defendant is contrary to law, and contrary to the separation of powers principles that are the very bedrock of our government.

RESPECTFULLY SUBMITTED this 17th day of October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2014, the *Amicus Curiae* Brief of the Arizona Prosecuting Attorneys' Advisory Council was electronically filed with the Clerk of the Arizona Supreme Court, using that Court's electronic filing system.

On this date a copy of the *Amicus Curiae* Brief was served electronically to the email addresses noted, and served by first-class mail, addressed to:

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CERTIFICATE OF COMPLIANCE

Under Rule 6(c) and Rule 23(c) of the Arizona Rules of Civil Appellate Procedure, I certify that the attached Brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font, and contains _____ words.

DATED this 17th day of October, 2014.

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